

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1260

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

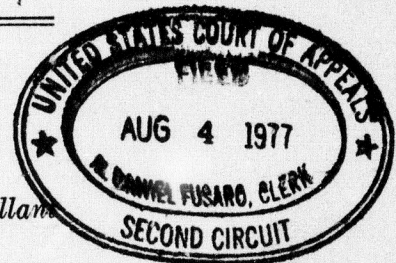
MICHAEL MOULTRIE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

MARTIN W. ALBERT
Attorney for Defendant-Appellant
840 Grand Concourse
Bronx, N.Y. 10451
(212) LU 5-6600



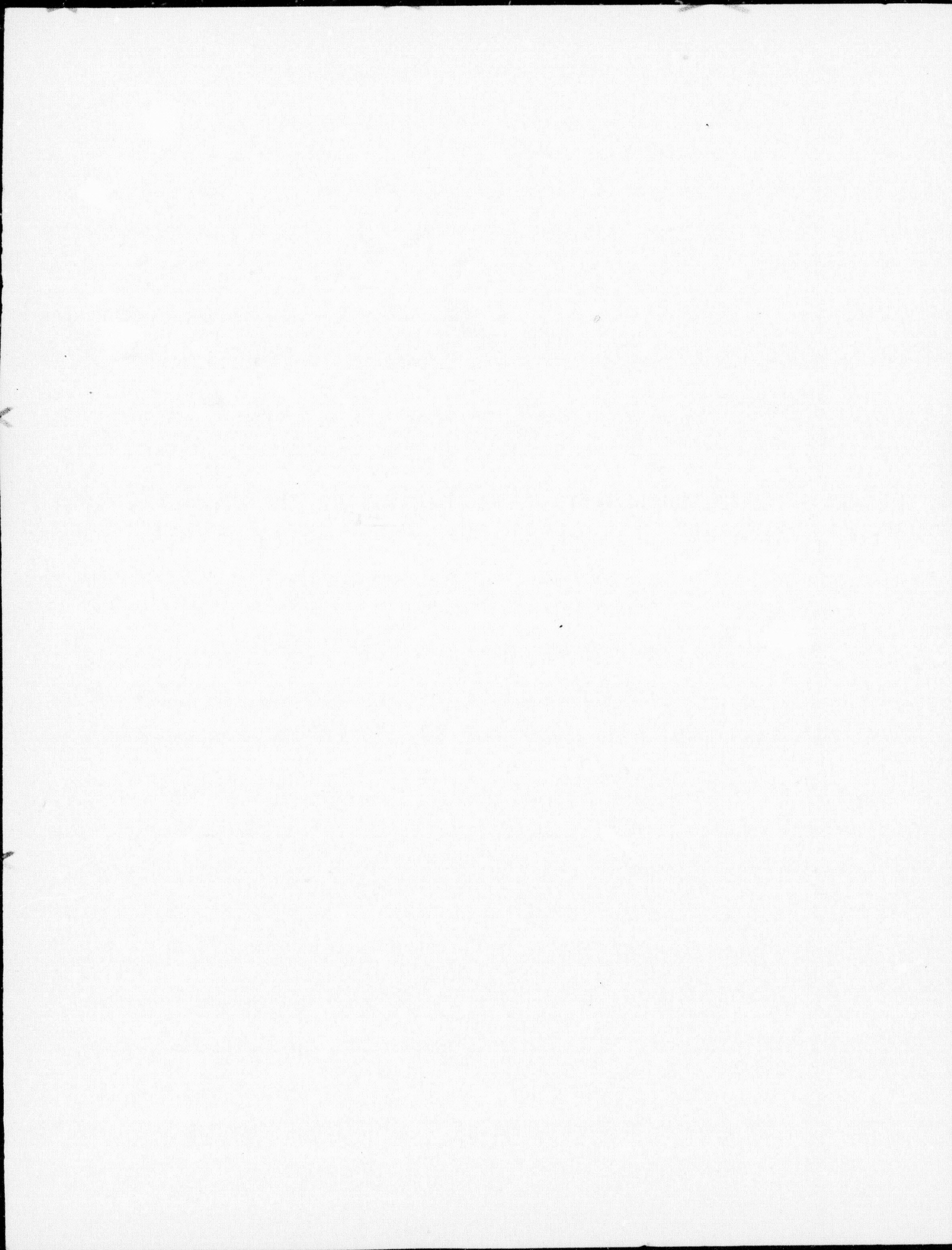


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Proceedings and Disposition in the Lower Court.....	2
STATEMENT OF FACTS.....	3
Suppression Hearing.....	3
Wade Hearing.....	6
The Trial.....	7
The Government's Case.....	7
The Defendant's Case.....	18
ARGUMENT.....	18
POINT ONE - The Evidence Seized And The Statements Made At The Time Of The Defendant's Arrest Should Be Suppressed....	18
POINT TWO - The Assistant United States Attorney Improperly Vouched For The Credibility Of The Govern- ment's Witnesses And Thereby Deprived The Defendant Of A Fair Trial.....	26
CONCLUSION.....	30

TABLE OF CITATIONS

<u>CASES</u>	<u>Page</u>
<u>Adams v. Williams</u> , 407 U.S. 143 (1972).....	23, 24
<u>Berger v. United States</u> , 295 U.S. 78 (1935)...	26
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975).....	25
<u>Nelson v. Moore</u> , 470 F.2d 1192 (1st Cir. 1972) <u>cert. den.</u> 412 U.S. 951 (1973).....	19, 21
<u>Pendergrast v. United States</u> , 416 F.2d 776 (D.C. Cir.), <u>cert. den.</u> 395 U.S. 926 (1969).....	19, 22
<u>Sibron v. New York</u> , 392 U.S. 40 (1968).....	24
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).....	21, 23, 24
<u>United States v. Anderson</u> , 533 F.2d 1210 (D.C. Cir. 1976).....	19, 20, 21
<u>United States v. Benter</u> , 457 F.2d 1174 (2d Cir.), <u>cert. den.</u> 409 U.S. 842 (1972)	26, 29
<u>United States v. Brawer</u> , 482 F.2d 117 (2d Cir.) on remand 367 F. Supp. 156 (S.D.N.Y. 1973), <u>aff'd</u> 496 F.2d 703, <u>cert. den.</u> 419 U.S. 1051 (1974).....	26, 29

	<u>Page</u>
<u>United States v. Burke</u> , 517 F.2d 377 (2d Cir. 1975).....	19
<u>United States v. Burse</u> , 531 F.2d 1151 (2d Cir. 1976).....	26
<u>United States v. Edmonds</u> , 535 F.2d 714 (2d Cir. 1976).....	20, 23
<u>United States v. Edwards</u> , 415 U.S. 800 (1974).	23
<u>United States v. Farnkoff</u> , 535 F.2d 661 (1st Cir. 1976).....	26, 29
<u>United States v. Grunberger</u> , 431 F.2d 1062 (2d Cir. 1970).....	29
<u>United States v. Kiame</u> , 258 F.2d 924 (2d Cir. 1958).....	29
<u>United States v. LaSorsa</u> , 489 F.2d 522 (2d Cir.) <u>cert.den.</u> 414 U.S. 855 (1973).....	26, 29
<u>United States v. Miley</u> , 513 F.2d 1191 (2d Cir.) <u>cert. den.</u> 423 U.S. 842 (1975).....	19, 21
<u>United States v. Puco</u> , 436 F.2d 761 (2d Cir.), <u>rev'd</u> and remanded 453 F.2d 539	

	<u>Page</u>
(1971), <u>aff'd</u> 476 F.2d 1099,	
<u>cert. den.</u> 414 U.S. 844 (1973).....	26
<u>United States v. Riggs</u> , 474 F.2d 699 (2d Cir.)	
<u>cert. den.</u> 414 U.S. 820 (1973).....	23
<u>United States v. Robinson</u> , 414 U.S. 218 (1973)	23
<u>United States v. Rollins</u> , 522 F.2d 160 (2d Cir.	
1975), <u>cert. den.</u> 424 U.S. 918 (1976)	19, 21
<u>United States v. Romano</u> , 482 F.2d 1183 (5th Cir	
1973), <u>cert. den.</u> 414 U.S. 1129 (1974)	19, 21
<u>United States v. Rueda</u> , 549 F.2d 865 (2d Cir.	
1977).....	19
<u>United States v. Tramunti</u> , 513 F.2d 1087 (2d	
Cir.), <u>cert. den.</u> 423 U.S. 832 (1975)	29
<u>United States ex rel. Walls v. Mancusi</u> , 406	
F.2d 505 (2d Cir.), <u>cert. den.</u>	
395 U.S. 958 (1969).....	19, 22, 23
<u>United States ex rel. Williams v. LaVallee</u> ,	
415 F.2d 643 (2d Cir. 1969), <u>cert.</u>	
<u>den.</u> 397 U.S. 997 (1970).....	19, 22

	<u>Page</u>
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963)	25
 <u>CONSTITUTIONAL PROVISIONS</u>	
Constitution of the United States	
Fourth Amendment.....	25
 <u>STATUTES</u>	
18 U.S.C. § 1708.....	2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No.

77-1260

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL MOULTRIE,

Defendant-Appellant.

BRIEF FOR THE APPELLANT

STATEMENT OF ISSUES

1. Whether the defendant was entitled to have the evidence seized and the statements made at the time of his arrest suppressed.
2. Whether the Assistant United States Attorney improperly vouched for the credibility of the Government's witnesses and thereby deprived the defendant of a fair trial.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant appeals from the United States District Court for the Southern District of New York, the Honorable Dudley B. Bonsal, Judge. This appeal follows a conviction after trial by jury of a violation of 18 U.S.C. §1708 (29 counts). The Court sentenced the defendant to concurrent terms of imprisonment of eighteen months on each count.

B. Proceedings and Disposition in the Lower Court

The original indictment was filed on October 29, 1976. Two superseding indictments were filed on December 6, 1976, and February 9, 1977, respectively. All three indictments accused defendant of various violations of 18 U.S.C. §1708.

Prior to trial hearings were held on defendant's motions to suppress identification testimony and physical evidence. The latter application was denied in a memorandum opinion (A. 17)* and the former motion was denied without opinion (A. 18).

*Reference are designated as follows: "A"-Defendant-Appellant's Appendix; "W"- Wade Hearing held on March 30, 1977; "Tr." - Trial held on March 30, 31, and April 1, 1977.

Following defendant's conviction and sentence on the second superseding indictment, the remaining three counts were dismissed and the other indictments were nolleed on the consent of the Government on June 1, 1977.

STATEMENT OF FACTS

SUPPRESSION HEARING

JOHN FEIS testified that he is a police officer with the New York City Police Department. On September 1, 1976, at approximately 11 A.M. he was on duty at the 120th Precinct on Staten Island (A. 20-21).

John Ciaravino entered the station house and told Feis that his wife had been raped the previous Sunday by two men who were in the park on Bay Street and Victory Boulevard. Feis went outside and spoke with Mrs. Ciaravino, who told him the same story. Then he asked the Ciaravinos, who had their own car, to follow him and officer O'Reilly to the park (A. 21-22).

Upon arriving at the park, Feis left his car and asked Mrs. Ciaravino if she could identify the men who had raped her. She pointed to one male sitting on a bench and another male standing and in conversation with a female (A. 22).

Feis further testified that the officers approached

the males and told them that the woman had accused them of raping her. The defendant was the male talking with a woman. The men were brought back to the car. There Mrs. Ciaravino responded that they were her attackers. As a result, the officers placed defendant and the other man under arrest and took them to the 120th Precinct, which is five blocks away (A. 23-24).

At the station house Feis interviewed the complainant and filled out an arrest report. After further investigation by the detectives, they voided the arrest (A. 24-25).

On cross-examination Feis testified that he did not ask Mr. Ciaravino whether he had been to the police station or whether his wife had made any complaints to the police prior to that day (A. 25). In addition, he admitted that he did not ask Mr. Ciaravino for a physical description of the men, their race or what they were wearing (A. 26-27).

Mrs. Ciaravino did not appear irrational when Feis originally spoke to her. Upon returning from the park, Mr. Ciaravino stated that his wife was a patient in South Beach Hospital--a state hospital for psychiatric patients (A. 27-29).

Feis also testified that the defendant made no move to run when he approached. The second man arrested was Thompson.

Mrs. Ciaravino pointed them out from her vehicle--at a distance of "25, 30 feet, 40 feet." Other black men were also in the park. In pointing out the two men, Mrs. Ciaravino said "the one there sleeping on the bench, which was Mr. Thompson, and the real gig there talking to the woman." (A. 30-31).

After bringing the defendant over to Mrs. Ciaravino, Feis told him he was under arrest. However, Feis did not put cuffs on him. Later, about a half hour or 45 minutes following their arrival at the precinct, Feis informed the defendant of his rights. (A. 36-37).

When Feis first spoke with Mrs. Ciaravino and at the time of the arrest, he asked her no particulars concerning the alleged rape (A. 32). Before her husband came to the precinct, he knew nothing about the incident. He claimed that he did not have time to question her about it (A. 34).

Feis' partner patted the defendant down on the street in the park before arriving at the station house (A. 39).

On re-direct examination Feis said that his partner patted the defendant down after he went over to him "at the beginning." The Defendant had a jacket which Reilly patted. Inside the jacket pocket he found 34 checks. Feis added that

this pat down took place when they first entered the park.

Then he stated that it took place "when we asked him to come to the radio car, and as we were going over" (A. 39-40).

On re-cross examination Feis reiterated that the checks were discovered and taken out before the defendant was arrested or taken over to the radio car (A. 40-41).

WADE HEARING

ROBERT HAZELWOOD, testified that he is a United States Postal Inspector. He prepared a photo spread which included a photograph of the defendant (W.4). On September 15, 1976 he showed it to Jimmy Bennett, who identified defendant as "Tony" (W. 10). Sometime in late 1976 or early 1977 Hazelwood showed the photographs to Alexander Dantzler, who thought that the defendant looked like someone he knew as "Midnight," although he was not sure (W. 12-13).

JOHN DOLAN testified that he is a Special Investigator with the Postal Inspection Service. On September 2, 1976, he showed a collection of photographs to Jones L. Parker, who picked out the defendant as "Midnight" (W. 40-42).

THE TRIAL

The Government's Case

JIMMY BENNETT testified that he is unemployed. He was convicted on his plea of guilty of possession of stolen mail--three welfare checks--after reaching an agreement with the Government that they would bring his cooperation to the attention of the sentencing judge. He received a sentence of two years probation (Tr. 17-21, 40).

Bennett claimed that he obtained the three checks, (Government Exh. 1, 2 & 3) from the defendant whom he knew as Tony (Tr. 21-22). In the early part of August, 1976 he met the defendant for the first time on 143rd and Seventh Avenue through an associate named Michael (Tr. 22, 24). They discussed getting rid of some checks. The defendant gave Bennett seven unendorsed welfare checks with a face value of four or five hundred dollars and kept three other checks (Tr. 24-27). Bennett took the checks to Jones L. Parker at his office at 148th Street and Seventh Avenue (Tr. 27-29).

During the month of August Bennett saw the defendant about nine times. He has not seen him since. In court the

defendant appeared heavier and had a closer haircut (Tr. 22-24).

The next day Bennett again went to the office, but Parker had no money. Bennett relayed this information to the defendant two days later, but said he could get it the following day. When Parker again did not have the money, Bennett took the defendant to his office. Parker gave Bennett \$78, which he turned over to the defendant. Two days later Parker handed Bennett \$38. The defendant gave Bennett \$25 from the first sum and \$10 out of the second payment (Tr. 30-35).

In the latter part of August the defendant gave Bennett three welfare checks and retained two others in his possession. Bennett brought them to Parker and accompanied him to the bank. There he was arrested (T. 37-39).

On cross-examination Bennett testified that he is also called JC and that he did not know that the defendant's first name is Michael. He knew the defendant as Tony and heard Parker refer to him as Midnight. A black man named Michael had introduced the defendant to him (Tr. 59-61).

When Bennett and Parker went to the bank on August 25, 1976, Bennett had the three checks. The payee was not endorsed on them (Tr. 66).

Bennett described the defendant's walk as with a "slough," by which he meant bent over with a dragging or shuffling of the feet. He remembered nothing distinctive about the defendant's left hand. The defendant often wore shorts (Tr. 73-75).

On redirect-examination Bennett stated that he spent a total of two hours with the defendant on seven occasions and the defendant was dressed differently than in court (Tr. 77-78).

On recross examination Bennett testified that the defendant wore a black shirt, black pants and sneakers in August. He noticed no silver rings (Tr. 80).

ALEXANDER DANTZLER testified that he was employed by Harold Borden as a receptionist for a two-week period ending on August 20, 1976 at an office located at 2566 Seventh Avenue in Manhattan. J.L. Parker was in the same office (Tr. 82-83).

The defendant came to the office two times each week. He asked for Parker and either saw him or left a message with the name Midnight. JC accompanied him the first and last time (Tr. 83-87).

On August 20, 1976 the defendant entered and asked for Parker. When told Parker was not in, he left saying he would

return. Later, he came back with JC, but Parker was still out. They sat down and waited. After two or three minutes they conversed with Borden. The conversation moved into the hallway for five minutes. As soon as they returned, JC left (Tr. 87-90). The defendant and Borden continued to speak and the defendant took a "brown regular leather shaped envelope" from his waist and handed it to Borden. After Borden looked inside it, they went out to the corridor. Upon returning Borden threw four checks on the side of the desk and the defendant left. Dantzler saw the name Luz Ramos on one check and Acosta on another (Government Exh. 4 & 5). Subsequently, Parker arrived. Shortly thereafter, postal inspectors entered (Tr. 90-96).

On cross-examination Dantzler claimed he had seen JC in the office two to four times. Dantzler remembered that JC arrived alone the first time, but could not recall if he was with someone else the next time, nor which time he came in with the defendant (Tr. 110-112, 115).

The defendant wore glasses and had braided hair. Dantzler could not recall his walk, clothes or whether he was wearing any rings (Tr. 115-116). One time he wore shorts (Tr. 121). He also did not remember if he had met the defendant before JC's first

trip to the office (Tr. 117).

When the postal inspectors arrived, the checks were still on Dantzler's desk (Tr. 121).

ROBERT HAZELWOOD testified that he is a United States Postal Inspector. On August 20, 1976 he went to 2566 Seventh Avenue with other postal inspectors and agents of the Secret Service. He saw Borden drop four checks (Government Exh. 4, 5, 6 & 7) to the floor and placed him under arrest (Tr. 124-125).

On August 25, 1976 he arrested Bennett and found three checks (Government Exh. 1, 2 & 3) in his possession. Bennett was in a car with Parker and an undercover agent (Tr. 127-128).

Hazelwood submitted the seven checks he recovered to the crime laboratory (Tr. 129).

On cross-examination Hazelwood testified that Dantzler was present when Borden was arrested and that he saw no checks on Dantzler's desk (Tr. 130).

BILLY R. DOTSON testified that he specializes in fingerprint examinations. He was accepted as an expert (Tr. 131-133).

Dotson processed seven checks and compared latent prints he found on them with known prints of the defendant (Government Exh. 46). He concluded that fingerprints on two of the checks

(Government Exh. 4 & 5) were the prints of the defendant (Tr. 136-139).

On cross-examination Dotson admitted that he cannot ascertain the age of the prints or whether the checks were ever held by the defendant (Tr. 146-148). He also testified that he did not compare the prints to anyone else's prints, other than the defendant's (Tr. 149).

CORNEILIUS O'REILLY testified that he is employed as a police officer of the City of New York. On September 1, 1976 he searched the defendant and recovered "30 some-odd food stamp coupon cards" (Government Exh. 8-41) from his jacket (Tr. 157-158).

On cross-examination he stated that the defendant did not try to run away when he was arrested. Once taken into custody, the defendant told the officer that he worked in the Post Office. He also said that he had planned to put the checks back, forgot to do so, and inadvertently took them with him when he went home (Tr. 161-162).

ROBERT YOST testified that he is a United States Postal Inspector. On September 1, 1976 he saw the defendant at the 120th Precinct on Staten Island. The defendant read, said he understood, and signed a form (Government Exh. 42) containing his constitutional

rights and a waiver thereof (Tr. 163-165).

Yost questioned the defendant concerning the authorization to purchase food stamp coupons (hereinafter referred to as ATPs). The defendant claimed that he obtained them from carrier cases at the Boulevard Station. He took them to the markup table to stamp the envelopes "moved, left no address, returned to sender." ATPs are not forwardable. When the defendant came across an ATP, he placed it in a separate stack. Next to them he also placed several magazines. Yost stated that the defendant said he had stamped all the ATPs. The defendant picked up an Ebony magazine and proceeded to the General Post Office. There he opened the magazine and found the ATPs inside. When questioned the defendant did not know why seven of the ATPs were not in envelopes and did not know why he had opened the envelopes containing the other ATPs or why seven envelopes were not stamped "return to sender, addressee unknown" (Tr. 167-171).

After the interview the defendant wrote out a statement (Government Exh. 43) reciting what had occurred with the checks. He swore to the truth of its contents, signed it and dated it (Tr. 172-173).

On the same day Yost took fingerprints of the defendant

(Government Exh. 46). The defendant's hair was approximately 3/4 to one inch long. He had a slight or light beard, wore glasses and appeared slightly thinner in the face than he does in court (Tr. 175, 177).

On cross-examination Yost answered that he did not recall whether the defendant had straight, curly or braided hair or September 1st (Tr. 178). He wore a shirt, slacks and thin jacket (Tr. 179). When asked about aliases, the defendant replied "Midnight" (Tr. 182). The defendant claimed he was unaware that he had taken the ATPs with the Ebony magazine (Tr. 185).

MICHAEL PACIULLO testified that he is the superintendent of station operations at the Boulevard Post Office in the Bronx. The station's zip codes are 10459 and 10474. All mail so designated must pass through that office for final delivery. Each of the Exhibits 1 through 41 are either so marked or mis-zip coded, but belong in that office (Tr. 186-191).

In August, 1976 the defendant was the late special delivery carrier at the Boulevard Station (Tr. 192).

ROBERT HAZELWOOD was recalled to the witness stand and testified that he kept Exhibits 1 through 7 in his case file until he submitted them to the Crime Laboratory in November.

He never showed them to the defendant (Tr. 199-200).

On cross-examination Hazelwood added that five other investigators were involved in the case. He made photo copies of the checks. Only he had access to the originals, although there is one other key for his case file (Tr. 201-203).

ANGEL RODRIGUEZ testified that he worked in the markup unit at the Boulevard Station in August, 1976. At that time approximately fifty per cent of the Welfare items were marked "return to sender" (Tr. 206-209).

According to Rodriguez, Sarah Cruz also worked at the markup unit. He knows the defendant whom he stated did not work with him there. Towards the end of the summer, in August, 1976, Rodriguez saw the defendant thumb through some of the mail in the City tray of the markup unit where the Welfare items are kept. Rodriguez asked what he was doing and the defedaant answered that he was looking for a letter for his girlfriend. Over a two-week period he saw the defendant in the vicinity of the trays thumbing through the New York City tray two or three times a week. He took out Welfare items, looked at the addresses and returned them. The defendant did not reply when asked what he was doing (Tr. 209-215).

At the end of August Rodriguez saw three or four letters

that looked like food stamps sticking out of the defendant's pocket. Rodriguez inquired and was told to mind his own business. Then the defendant said he could get some money for them from some people whom he knew (Tr. 215-218).

On cross-examination Rodriguez testified that the defendant continued working that day even after Rodriguez told Paciullo that he saw the letters in the defendant's pocket. Paciullo told Rodriguez that he would report it to the inspectors (Tr. 219-220). Rodriguez saw three or four letters in the defendant's back pocket (Tr. 222). The address side was facing away from his pocket and Rodriguez did not see the names on the envelopes (Tr. 233-234).

PROVIDENCIA CRUZ testified that Exhibit 2 is addressed to her, but that she never received it. She resided at 961 Westchester Avenue in August, 1976. At that time Cruz was collecting welfare. The first check was delivered by mail, but the second check, which she expected about August 19th, never came (Tr. 236-240).

On cross-examination Cruz stated that she was supposed to get \$171.05 every two weeks. She never lived at 971 Westchester Avenue--the address on the check (Tr. 240-241).

LUZ RAMOS testified that she moved from 1161 Hoe Avenue on July 25, 1976 and notified the Post Office thereof. In the summer of 1976 she obtained welfare by mail every fifteen days. Ramos claimed that she never received Exhibit 4, dated August 16, 1976 and addressed to her, at the Hoe Avenue address (Tr. 244-247).

On cross-examination she noted that she keeps no records of the checks she received (Tr. 248-249).

JOYCE SMITH testified that she is employed by the Department of Social Services working in the cancellation and transcript section which controls, reports, transmits and accounts for public assistance checks returned by the Post Office and other agencies (Tr 249-250). It was then stipulated that Exhibit 4, addressed to Luz Ramos, was never returned to the Department of Social Services as it should have been, because she no longer lived at that address (Tr. 251).

It was stipulated that Exhibits 1 through 7 are welfare checks issued by the New York City Department of Social Services, that each check was placed in the mail on the last working day preceding the date appearing on the check, and that each check was addressed to the person whose name appears on the check at the

address which appears on the check. It was further stipulated that Exhibits 8 through 41 are ATPs issued by the New York City Department of Social Services, that they were placed in the mail on or about August 30, 1976, and that each ATP was addressed to the person whose name appears on the ATP at the address which appears on the ATP.

The Defendant's Case

The defense presented no evidence.

ARGUMENT

POINT ONE

THE EVIDENCE SEIZED AND THE STATEMENTS MADE AT
THE TIME OF THE DEFENDANT'S ARREST SHOULD BE SUPPRESSED.

The defendant was arrested on the basis of a woman's complaint that three days previous thereto he had raped her. It is undisputed that the stolen checks forming the basis for counts three through twenty-nine were seized at the time of this arrest. Later, at the precinct, the defendant made statements concerning the confiscated property to a postal inspector.

While contesting the existence of probable cause herein, the defendant does not deny the right of the police to act upon information supplied by an eyewitness to or a victim of a crime

(United States v. Rueda, 549 F.2d 865, 869 [2d Cir. 1977];
United States v. Anderson, 533 F.2d 1210, 1213 [D.C. Cir. 1976];
United States v. Rollins, 522 F.2d 160, 164 [2d Cir. 1975], cert.
den. 424 U.S. 918 [1976]; United States v. Burke, 517 F.2d 377,
380 [2d Cir. 1975]; United States v. Miley, 513 F.2d 1191,
1204 [2d Cir.], cert. den. 423 U.S. 842 [1975]; United States v.
Romano, 482 F.2d 1183, 1189-1190 [5th Cir. 1973], cert. den. 414
U.S. 1129 [1974]; Nelson v. Moore 470 F.2d 1192, 1197 [1st Cir.
1972], cert. den. 412 U.S. 951 [1973]; Pendergrast v. United
States, 416 F.2d 776, 785 [D.C. Cir.], cert. den. 395 U.S. 926
[1969]; United States ex rel. Williams v. LaVallee, 415 F.2d
643, 645-646 [2d Cir. 1969], cert. den. 397 U.S. 997 [1970];
United States ex rel. Walls v. Mancusi, 406 F.2d 505, 508 [2d Cir.],
cert. den. 395 U.S. 958 [1969]). It would appear, however, that
an alleged victim would be more involved and interested than a
mere witness and, perhaps, have an ulterior motive making him less
reliable.

Here, the police proceeded upon the bare statements of the
supposed victim. They were told that she had been raped three
days earlier and accompanied her to the park. The police did
not ask for or obtain a description of the perpetrators, inquire

whether a prior report had been made, ascertain whether medical attention was received, learn if a weapon had been involved or find out anything else about the complainant or her phony case. When they arrived at the park, the officers saw the defendant and another alleged rapist with other people in the park engaged in innocent activities. They approached the pair and informed them of the rape complaint. Neither man attempted to flee or in any way refused to cooperate with the police. The defendant was not even placed in handcuffs. In fact, he agreed to go over to the radio car. Nevertheless, the defendant was arrested and searched. At this point, it is respectfully submitted, the police lacked the requisite probable cause, without which an arrest is improper (United States v. Edmonds, 535 F.2d 714, 719 [2d Cir. 1976]).

Unlike the present situation, the courts found corroboration of the informant's statements in all of the above cited cases. In addition, generally the alleged crimes had just been committed and the factors known to the police called for immediate action.

For example, in United States v. Anderson (supra at 1213) the court noted, "But these requirements [a showing of reliability

of the informant and his information] do not apply with equal force when the police are approached on the street by an unknown citizen who claims to have been the victim of a crime just moments before" (emphasis added). The Anderson court continued by finding sufficient grounds for the police "to proceed to appellant's room to investigate the alleged armed assault" (533 F.2d at 1214), pursuant to the doctrine enunciated in Terry v. Ohio (392 U.S. 1[1968]). The Second Circuit, in upholding the arrest in United States v. Rollins (supra at 165) also commented that " the information provided by Williams [a witness] was amply corroborated." Likewise, in United States v. Miley (supra at 1204) the statements of the confessed participant in the very crime for which the contested arrest was made "were amply corroborated." In the Fifth Circuit an attorney relayed informant received from a kidnapped victim's wife as to the location of her captive husband. The need to act quickly there is self evident. The court sustained the arrest under both probable cause and the likelihood of a failure of justice standards. With respect to the former, the court specifically cited as significant the independent verification of key details by the police before they acted (United States v. Romano, supra at 1190). Meanwhile, in Nelson v. Moore, supra, a fourteen-year-old runaway girl, who had

been beaten and burned by the defendants--one of whom had had sexual intercourse with her--and who had been forced to go out as a prostitute, reported the matter to the police. There, the First Circuit, too, found the victim of a crime to be a reliable source, but also commented that "these officers had substantial corroboration of the informant's information, consisting of the scars and marks on her face, her possession of a key which opened the outside door of the apartment building and the Nelson-Moore apartment, and her willingness to confront Nelson at the apartment door" (470 F.2d at 1197). The District of Columbia Circuit, in another decision dealing with the right to arrest following the complaint of an alleged victim of a crime, included the facial bruises and bleeding of the complainant as factors leading to probable cause (Pendergrast v. United States, supra at 784). In that case, too, the crime immediately preceded the arrest. Finally, in United States ex rel. Williams v. LaVallee, supra, and United States ex rel Walls v. Mancusi, supra, this court upheld robbery arrests shortly after the commission of the crimes. Both cases contained allegations which were corroborated. In Williams no arrest was made until guns were sighted. In Walls the police pursued two men whom

they saw running from the crime scene.

The defendant does not disagree that the search was proper as incidental to a lawful arrest, if the officers had probable cause to proceed (United States v. Edwards, 415 U.S. 800 [1974]; United States v. Robinson, 414 U.S. 218 [1973]; United States v. Edmonds, supra). Nor does the defendant suggest that the time of formal arrest controls (United States v. Riggs, 474 F.2d 699, 704 [2d Cir.], cert. den. 414 U.S. 820 [1973]; United States ex rel. Walls v. Mancusi, supra at 508-509). Common sense dictates that the police must respond to a citizen complaint of the past commission of a serious crime. However, here the police went too far.

Considering the factual situation, as reviewed above, without further investigation the police had no right to go beyond temporarily detaining the defendant for questioning (Adams v. Williams, 407 U.S. 143 [1972]; Terry v. Ohio, supra). The crime was old and uncorroborated. The defendant was entirely cooperative. Whether or not they even had the right to stop the defendant is dubious. The officers had ample time to question the complainant on the way to the park, but chose to drive in separate vehicles. Thus, the absence of additional knowledge on

the part of the police when they arrived at the park rested upon their conscious decision not to inquire further or their lack of ability or their laziness or a combination of these factors.

Assuming, arguendo, a basis for stopping the defendant, the right to search him does not automatically follow. The record is barren of any indicia that the defendant was armed or dangerous or that any weapon had been displayed during the alleged rape. The absence of danger is highlighted by the decision not to use handcuffs (see Adams v. Williams, supra at 146-148; Sibron v. New York, 392 U.S. 40, 65 [1968]; Terry v. Ohio, supra at 24).

Even under the guidelines of Adams and Terry, since a search incidental to a stop is solely justifiable for the protection of the police officer and others nearby, "it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" (392 U.S. at 27). Thus, while patting the pockets of the jacket the defendant was carrying might fall within this rule, reaching into the pocket and removing the checks would not be so protected.

Accordingly, the search herein violated the defendant's Fourth Amendment rights.

Not only were the seized checks illegally obtained because the search which produced them neither followed a lawful arrest nor was confined to a frisk, but the subsequent statements made by the defendant were likewise tainted (Brown v. Illinois, 422 U.S. 590 [1975]; Wong Sun v. United States, 371 U.S. 471 [1963]). Although the statements were made after the defendant was advised of the Miranda warnings, that factor alone does not purge the taint (422 U.S. at 602). The other controlling factors herein are the closeness in time between the arrest and the questioning, the confrontation of the defendant with the illegally seized checks and the implicit threat of loss of employment for the failure to explain the checks to the postal inspectors.

Finally, it must be noted that the seized checks do not involve two of the twenty-nine counts upon which the defendant was convicted. However, considering the trial issues of identity and intent, it cannot be seriously argued that the illegally obtained checks did not have a devastating impact upon the jury's verdict on counts one and two.

POINT TWO

THE ASSISTANT UNITED STATES ATTORNEY IMPROPERLY
VOUCHED FOR THE CREDIBILITY OF THE GOVERNMENT'S
WITNESSES AND THEREBY DEPRIVED THE DEFENDANT OF A
FAIR TRIAL.

It is improper for the prosecutor to inject himself into the proceedings and thus become an unsworn witness. He cannot suggest that he possesses evidence or knowledge that a defendant is guilty or otherwise put his own integrity in issue (Berger v. United States, 295 U.S. 78, 88-89 [1935]; United States v. Farnkoff, 535 F.2d 661, 668 [1st Cir. 1976]; United States v. Burse, 531 F.2d 1151, 1154-1155 [2d Cir. 1976]; United States v. Puco, 436 F.2d 761, 762 [2d Cir.], rev'd and remanded 453 F.2d 539 [1971], aff'd 476 F.2d 1099, cert. den. 414 U.S. 844 [1973]). In the same vein, it is improper "to put the prestige of the United States Attorney's Office behind the Government's case" (United States v. Brawer, 482 F.2d 117, 134 [2d Cir.], on remand 367 F. Supp. 156 [S.D.N.Y. 1973], aff'd 496 F.2d 703, cert. den. 419 U.S. 1051 [1974]; United States v. LaSorsa, 480 F.2d 522, 526 [2d Cir.], cert. den. 414 U.S. 855 [1973]; United States v. Benter, 457 F.2d 1174, 1176 [2d Cir.], cert. den. 409 U.S. 842 [1972]).

In the case at bar the entire tenor of the summation

by the Assistant United States Attorney suggests that he believed his witnesses and, therefore, so should the jury. Although his closing argument was brief (Tr. 267-276), again the prosecutor notes what "we" have done and thus makes himself and his witnesses appear as one. He starts out seemingly innocently stating "we have proved that Luz Ramos and Providencia Cruz did not receive them" (Tr. 269), and adding "So what do we know about these checks" (id.), and "what do we know happened on August 20th?" (id.). Next, he employs the phrase "we submit you can find from the evidence" a number of times (Tr. 270, 272, 273, 274, 275). In addition, he told the jury with respect to much of the proof "there is no question" (Tr. 268, 269, 273, 275). He also comments that "[t]he evidence we submit is clear" (Tr. 271), "his statement which we submit you can find to be absurd" (Tr. 275), and "we submit you can find that there is no question of intent" (id.). These statements alone may be no more than one man's style of arguing from the evidence, but they subtly put the prosecutor's personal opinion into the jurors' thoughts.

With this background in mind, the defendant asks this court to consider the propriety of the rebuttal closing argument

(A. 46-52). There, too, the prosecutor utilizes the words "we submit he has told the truth" (A. 47), "we submit that the fingerprint evidence is devastating" (A. 49), "[h]e's not getting anything from us anymore" [referring to a cooperating accomplice] (id.), and "we submit that you can find he told you the truth" (id.). He concludes with the following:

"Again, it failed, ladies and gentlemen; they did, [identify the defendant] and we submit that you can find that they testified truthfully.

"Ladies and gentlemen, there is no more solemn duty, and it is not a pleasant duty, sitting in judgment on a fellow citizen. That is your duty. You were sworn, and you took an oath as jurors, to apply the evidence the facts, the law as the Judge gives you, to render an honest verdict.

"We submit the only way to apply this evidence, these facts, this case, is to find Michael Moultrie guilty of the crimes charged beyond a reasonable doubt.

"Thank you for your attention" (A. 50).

The defense attorney immediately objected (id.) and articulated the reason therefor as improper "bolstering" of the testimony of the Government's witnesses by the Assistant United States Attorney (A. 51). Nevertheless no curative instructions were given by the court.

As in United States v. Grunberger (431 F.2d 1062, 1068 [2d Cir. 1970]), the prosecutor's statements were "not merely an averment of a personal belief . . . based on the evidence adduced at . . . trial." The prosecutor cannot tell the jury that he thinks the defendant is guilty (United States v. Farnkoff, supra).

Moreover, the remarks herein were unprovoked. In his summation the defense attorney attacked the credibility of the Government's witnesses, but in no way impugned the integrity of the Office of the United States Attorney. Therefore, it cannot be argued that these disputed comments constituted a proper response (see United States v. Tramunti, 513 F.2d 1087, 1118-1119 [2d Cir.], cert. den. 423 U.S. 832 [1975]; United States v. Brawer, supra; United States v. LaSorsa, supra; United States v. Benter, supra; United States v. Kiame, 258 F.2d 924, 934 [2d Cir. 1958]).

In sum, the prosecutor's summation prejudiced the defendant.

CONCLUSION

THE JUDGMENT OF CONVICTION IN THE DISTRICT
COURT SHOULD BE REVERSED AND THE MATTER REMANDED
FOR A NEW TRIAL.

Respectfully submitted,

MARTIN W. ALBERT
Attorney for Defendant-Appellant
840 Grand Concourse
Bronx, New York 10451
Phone: (212) 1u5-6600

<i>Copy Received</i>					
Date	<table border="1"><tr><td>COPY RECEIVED</td></tr><tr><td>ROBERT B. FISKE</td></tr><tr><td>AUG 4 - 1977</td></tr><tr><td>U. S. ATTORNEY SO. DIST. OF N. Y.</td></tr></table>	COPY RECEIVED	ROBERT B. FISKE	AUG 4 - 1977	U. S. ATTORNEY SO. DIST. OF N. Y.
COPY RECEIVED					
ROBERT B. FISKE					
AUG 4 - 1977					
U. S. ATTORNEY SO. DIST. OF N. Y.					